

DEFENDERS OF WILDLIFE

IBLA 83-464

Decided February 13, 1984

Appeal from a decision of the Lewistown, Montana, District Office, Bureau of Land Management, denying a protest of the determination to manage and control black-tailed prairie dogs in grazing allotments in the Phillips Resource Area. MT-060-83-5.

Affirmed.

1. Rules of Practice: Appeals: Service on Adverse Party
Failure to serve a copy of the notice of appeal on an adverse party within the time required subjects an appeal to summary dismissal pursuant to 43 CFR 4.413. A motion to dismiss an appeal because of a failure to comply with the service requirement will be denied where the moving party fails to show any prejudice from the failure to serve and the record indicates that the moving party had actual notice of the appeal.
2. Environmental Quality: Environmental Statements -- National Environmental Policy Act of 1969: Environmental Statements

Protest to a decision to implement a management and/or control program for black-tailed prairie dogs is properly denied where the decision is based on an environmental assessment which reflects an evaluation of the environmental impacts sufficient to support an informed judgment.

APPEARANCES: Hank Fischer, Montana representative, for Defenders of Wildlife; Richard K. Aldrich, Esq., Office of the Field Solicitor, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

This appeal arises as a result of the Bureau of Land Management's (BLM) determination to control and/or manage the black-tailed prairie dog population in the Phillips Resource Area (Phillips RA), Montana. The determination was based on alternatives described in a programmatic environmental assessment

(EA) completed in June 1982. 1/ The EA proposed four alternatives -- the first involved complete control of the population by poison, the second and third alternatives were to control and manage different numbers of prairie dog towns and acreage, and the fourth alternative proposed no control. 2/ BLM solicited comments on the EA.

In an August 30, 1982, letter, Hank Fischer, the Montana representative of Defenders of Wildlife, commented that the EA, unlike the BLM Prairie Dog Ecosystems Habitat Management Plan of 1979 (Draft) (HMP), failed to acknowledge the important ecological role of prairie dogs. He claimed that the "entire thrust" of the EA seemed to be how many prairie dogs could be poisoned without suffering unacceptable losses of other resources, "rather than attempting to assess how many prairie dogs can exist in Phillips County as [BLM] attempts to reach some predetermined goals." Fischer concluded that BLM should design criteria to determine whether, in fact, there was a prairie dog problem.

On September 30, 1982, BLM issued its decision statement adopting the second alternative (alternative B), described in the EA, with certain modifications. 3/ The decision statement provided that the intent of the decision

1/ The EA compares the environmental consequences of implementing the alternatives. It states that all other components of implementing an allotment management plan (AMP) are analyzed in the Missouri Breaks Grazing Environmental Impact Statement (EIS), the Prairie Potholes Grazing EIS and the Lewistown District Water Development Programmatic Environmental Assessment.

2/ The preamble to the EA specifically states that if a control and/or management alternative is chosen for implementation, the EA itself would be programmatic, i.e., it would function as a reference document pertaining to repetitive, similar actions only and that:

"Environmental reporting on individual proposed actions would be by reference to the program EA with supplements or refinements if a specific action was exceptional and was not anticipated in the programmatic. The analysis process would be documented by an EA cover sheet placed in our EA chronological file. The cover sheet would reference this program EA plus other program EAs that deal with other actions involved in implementing a particular AMP (i.e., construction of reservoirs) and would also contain attached exception analysis if needed. Consequences of any actions not covered by reference documents would also be included but would be documented in individual site-specific EA format." (EA at ii).

3/ Alternative B, as set forth in the EA, proposed to control, within 5 years, 81 prairie dog towns covering 7,375 acres. The remaining 15 to 20 towns, covering 900 to 1,200 acres, would be managed. The proposed control action would affect 43 grazing allotments. Managed prairie dog towns would be included in 15 allotments.

Proposed methods to accomplish the plan consisted of:

- "1. amending or preparing the AMP,
2. completing the damage assessment report,
3. completing the environmental clearances,
4. evaluating the assessment and clearances,
5. controlling prairie dog towns which require action,
6. treating any prairie dog town mechanically or chemically (fertilizer) that would not respond to poisoning alone,
7. implementing the grazing system,
8. monitoring the AMP to reach the objectives of the plan

was to identify the general level of control or management anticipated for prairie dog towns on public lands in the Phillips RA and that no final decision on control of a specific town would be made until the following actions occurred:

1. A damage assessment will be completed to determine the nature and extent of resource damages attributable to prairie dogs and to identify management actions that might be taken to provide for resource recovery.
2. An inventory will be conducted for Federally listed threatened and endangered species and species of special concern to the Montana Department of Fish, Wildlife and Parks.
3. An allotment management plan (AMP) for the grazing allotment in which the prairie dog town occurs will be prepared in consultation with the grazing permittee and other interested parties. The AMP will set forth the objectives for resource management and describe those actions necessary to meet the management objectives including, as appropriate, livestock management systems, water development, prairie dog control and vegetative treatments. During preparation of the AMP a benefit/cost analysis will be made and the AMP will be implemented only if the economic benefits exceed the costs.

The decision statement listed the anticipated results to be as follows:

1. The allowable acreage occupied by prairie dogs on public lands within any allotment will not exceed one percent (1%), an increase from the limit of one-half percent (1/2%) proposed in Alternative B (see the revised Table 3 attached).
2. Of the 96 prairie dog towns now known to occur on public lands within the Phillips Resource Area, at least 15 towns within 15 grazing allotments will be managed for continued prairie dog habitat. This will provide at least 1,640 acres of habitat.
3. AMPs will be prepared or revised in the 43 allotments containing prairie dog towns.
4. Initial control efforts will be completed within the next 5 years as long as adequate manpower, equipment and funds are available.
5. Any additional prairie dog towns found on the public lands within the resource area will be evaluated following the criteria in this document and will be controlled or managed as determined through development or revision of the applicable AMP.

fn. 3 (continued)

9. completing endangered species clearance on a managed town as periodic control is necessary (this clearance is only good for 12 months, then must be redone),
10. poisoning prairie dogs which need maintenance on a periodic basis." (EA at 11).

The decision statement further provided that the plan would be monitored by range, soil and wildlife studies which include soil evaluations, wildlife species observations, actual use, plant cover, utilization and range condition by soil mapping units, exclosures, and vegetative production studies.

In an October 4, 1982, letter, BLM answered Fischer's comments concerning the EA, acknowledging that the tone of the EA was different from that of the HMP. ^{4/} BLM stated, however, that the HMP "precipitated" the April 1980 BLM Montana State Office Prairie Dog Habitat Management Policy Statement (Exh. 5-B) and that the EA followed the intent of that policy but was written in terms of a multiple use view. BLM also acknowledged that prairie dogs are not the cause of overused ranges, but are the result. However, BLM noted that prairie dogs are found in disturbed areas where there is a lack of vegetation and that such areas are part of any grazing operation whether the range is in poor or excellent range condition. BLM also stated that once prairie dogs are established, they create their own habitat without concern for the surrounding range condition. BLM specifically stated that the EA was programmatic and that specific goals would be developed in AMPs before prairie dog control and/or management would take place.

By letter of October 20, 1982, Fischer protested BLM's selection of alternative B. He stated that criteria based on firm resource data and careful economic analysis is necessary for when and where prairie dog control is undertaken. Fischer contended that the criteria on which BLM's decision was based were purely arbitrary. Fischer, citing that part of the decision statement which provided that allowable acreage occupied by prairie dogs on public lands within any allotment would not exceed 1 percent, listed points which he asserted should have been involved in reaching any percentage figure.

In a November 15, 1982, reply BLM denied Fischer's protest stating:

[The] decision provides assurance that at least 15 prairie dog towns comprising 1,640 acres will remain on public lands within Phillips County and lays out the process which will be followed in making future site-specific decisions on the remaining prairie dog towns. The key element in this process is the development of a site-specific management plan on a grazing allotment that considers all resource problems and management opportunities. If studies show no resource damage is occurring, we will not control a prairie dog town. If it is shown through a Cost/Benefit analysis for an allotment management plan (AMP) that the cost of control is prohibitive, then it would be my decision not to carry through with the treatment.

We hope that you and all other interested parties will assist us as we work toward preparing these plans.

The figure of one percent for allowable acreage of prairie dog towns in an allotment came about, as you know, by convening a panel of people representing both sides but wishing to find a solution. In reality, what application of the one percent figure

^{4/} The HMP (Exh. 5-A) is only a draft and was never finalized.

and other criteria developed in the document does is protect the interests of both sides. This and other factors such as accessibility to the public for viewing or sport shooting were considered in determining the towns to be left for continued management. Yet, because of the one percent criterion, no grazing permittee will be expected to suffer economically because we have decided to keep prairie dogs in his grazing allotment. [Emphasis in original.]

Fischer appealed the denial of the protest. He contends, on behalf of Defenders of Wildlife, that the decision regarding the management and/or control of black-tailed prairie dogs in the Phillips RA is arbitrary and factually erroneous. Fischer cites the fact that the decision would limit prairie dogs to a minimum of 1,640 acres in the 1.1 million acre Phillips RA. He contends that adequate data have not been presented to indicate that a problem is present, and that criteria have not been developed to determine where and when control and/or management should occur.

[1] On January 31, 1983, the Office of the Field Solicitor, on behalf of BLM, filed a motion to dismiss the appeal alleging that the notice of appeal was not timely filed and that a copy of the notice of appeal had not been served on the Field Solicitor's office as required by 43 CFR 4.413.

On February 2, 1983, the Office of the Field Solicitor withdrew the motion to dismiss as to the untimely filing of the notice of appeal. ^{5/} On February 3, 1983, Fischer filed a response to the motion to dismiss the appeal stating that he was unsure where to file the notice of appeal and that he did send notice of the appeal to the BLM District Office and to the Office of Hearing and Appeals. Fischer further states that "[g]iven that the Field Solicitor in Billings sent me a copy of my notice of appeal, it would seem self-evident that he was apprised of my intent to appeal."

The Office of the Field Solicitor has not shown that any prejudice resulted from the failure of service. In addition, Fischer has alleged that the Office of the Field Solicitor had actual knowledge of the notice of appeal. This has not been denied. 43 CFR 4.413 provides that "[f]ailure to serve within the time required will subject the appeal to summary dismissal." Failure to serve does not mandate dismissal of the appeal. Cf. Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1968) (failure to timely file a statement of reasons does not mandate dismissal of an appeal). In this case where no prejudice has been shown and the party to be served apparently had actual knowledge of the appeal, the appeal will not be dismissed. See United States v.

^{5/} That part of the motion to dismiss relating to the timeliness of the appeal was withdrawn because BLM had advised the Office of the Field Solicitor that Fischer was orally informed that the time limits for filing an appeal would not begin to run until receipt by Fischer of the Nov. 24, 1982, certified copy of the District Manager's decision and relying upon that information, Fischer filed his appeal on Dec. 21, 1982. The record contains two identical letter decisions denying the protest, one is dated Nov. 15, 1982, the other is dated Nov. 24, 1982. Only the Nov. 24, 1982, decision contains a notation showing that it was sent "Certified Mail - Return Receipt Requested."

Rice, No. 72-467-PHX WEC (Feb. 1, 1974), reversing United States v. Rice, 2 IBLA 124 (1971). The motion of the Office of the Field Solicitor is denied.

[2] The HMP referred to by Fischer (exhibit 5-A in the case record) discusses both the benefits and damage caused by prairie dogs, specifically the black-tailed prairie dog. The HMP at page 16 states that in the Phillips RA specific problem areas have been pin-pointed and "the control of black-tailed prairie dogs in south Phillips County is identified in the Phillips [Management Framework Plan] where numerous and large prairie dog towns exist." The HMP further states that local ranchers and BLM personnel attribute substantial reductions in livestock forage and deteriorated watershed conditions to the excessive numbers of prairie dogs in south Phillips County. 6/

[2] The HMP notes at 38 that, since corrective action depends on the magnitude of the disturbance, an interdisciplinary team should be established to examine public lands and "quantify" prairie dog damage. The HMP further states at 39 that the team should include at least a range and a watershed specialist, as well as a wildlife biologist, and the team should be responsible for providing data to support any decisions effecting prairie dog control and related restoration of rangelands. 7/

As noted in the EA at page 7, a panel of specialists was convened on December 10, 1981, to help shape the alternatives in that document. The panel consisted of representatives of the Fish and Wildlife Service, the Charles M. Russell National Wildlife Refuge, the Bureau of Indian Affairs, the Montana Department of Fish, Wildlife, and Parks, the Montana Department of Agriculture, the Montana Audubon Society, local landowners, local ranchers, a local planning board, and a varmint shooter, as well as BLM personnel from the Lewistown District Office and the Phillips RA. As regards the panel, the EA states at page 7:

6/ The Wildlife Habitat section of exhibit 3 in the case record, BLM's Management Framework Plan for the Phillip's RA, provides under Multiple Use Recommendation number 6 that prairie dog eradication by poison is not to be done on towns where there is proven evidence of the black-footed ferret and that preservation of three to four prairie dog towns of 30 to 40 acres each per township is to be allowed to preserve the associated endangered and threatened wildlife species (e.g., burrowing owl, mountain plover, and bald eagle).

Using table 3 as found in the EA; and as revised and attached to the decision statement, prairie dog towns covered a total of 8,274 acres of the allotments to be managed or controlled under alternative B. As revised by the decision statement, at least 15 towns within 15 grazing allotments were proposed for management providing as habitat 1,640 acres or almost 20 percent of the acreage currently covered by prairie dog towns.

7/ The record contains a Dec. 10, 1982, memorandum (Exh. 9) - regarding "Prairie Dog Damage Assessment" which was sent to the Lewistown District Manager by a range conservationist and a soil scientist who, together with a second soil scientist and a wildlife biologist, had conducted, in November 1982, resource damage assessments on 15 prairie dog towns in seven priority allotments in south Phillips County. The memorandum notes the methods of damage assessment used and contains a "Table I" which summarizes the findings and which shows that significant resource damage was evident.

The panel discussed the anticipated impacts of the two extremes, total control and no action, and developed criteria to assist BLM in developing one or more additional alternatives. These criteria were developed with a high and low range, depending on the preference or tolerance of the livestock operator group and the environmentalist/recreationist group. These criteria consisted of town size (20-320 acres), number of towns per township (1-3), public access (1-10 miles), encroachment onto private or state lands (.25-1.00 miles), percent of public lands acres in an allotment covered by prairie dogs (.5-1.5%), new towns should be poisoned first, towns near CMR [Charles M. Russell National Wildlife Refuge] should have high priority as managed towns and managed towns left for shooting should be properly located for public safety. These criteria were used to develop Alternatives B and

C. The most important criterion separating these two alternatives was the percent of acreage in an allotment covered by prairie dog towns. The remaining criteria were then applied to both Alternatives B and C.

Other criteria in the selection of managed towns would be the discovery of evidence of Endangered or Threatened Species (black-footed ferret) or a high concentration of Species of Special Concern. Decisions about the importance of this discovery in relation to how a prairie dog town is managed will be made at the time the evidence surfaces. In the case of endangered and threatened species, consultation with the United States Fish and Wildlife Service (USFWS) would be required.

Another consideration for the selection of a managed town that should be applied as an AMP is developed is the slope gradient present on a given prairie dog town. Towns with a low slope gradient would have less water erosion (less surface damage) and should have a higher consideration for management.

In an adequate environmental assessment statement an agency must take a "hard look" at the problem, as opposed to setting forth bald conclusions; identify the relevant areas of environmental concern; and make a convincing case that environmental impact is insignificant. Fund For Animals v. Frizzell, 402 F. Supp. 35 (D.D.C.), aff'd, 530 F.2d 982 (D.C. Cir. 1975); Maryland-National Capital Park and Planning Commission v. United States Postal Service, 487 F.2d 1029, 1039-40 (D.C. Cir. 1973). The environmental assessment in this case sets forth available alternatives, including two possibilities for management and control of prairie dogs. The decision statement, in fact, modified the chosen alternative to allow for more land to be dedicated to prairie dog habitat than was originally contemplated. The criteria upon which the evaluation was made are clearly set out in the EA. Although not the criteria preferred by Fischer, we find that the entire record read together with the EA provides sufficient evaluation of all relevant factors to support the decision for control and management of prairie dogs in the Phillips RA. See Dolores M. Lisman, 67 IBLA 72, 75 (1982), and cases cited therein.

In Natural Resources Defense Council, Inc. v. Morton, 388 F. Supp. 829 (D.D.C. 1974), aff'd, 527 F.2d 1386 (D.C. Cir.), cert. denied, 427 U.S. 913

(1976), a proposed BLM overall programmatic environmental impact statement for grazing was held not to be sufficient to comply with the requirements of the National Environmental Policy Act (NEPA). 42 U.S.C. §§ 4321-4361 (1976). This was because, standing alone, the proposed environmental impact statement did not provide a detailed analysis of local geographic conditions necessary for the decision maker, the BLM district manager, to determine what course of action would be appropriate under the circumstances.

In the present situation, the environmental assessment at issue does not attempt to provide a plan for the implementation of prairie dog control as to each individual allotment within the Phillips RA. Rather, the EA, together with the material which preceded it, sets a general policy for prairie dog control based upon data which was sufficient for the district manager to analyze available alternatives and their consequences.

Further, as specifically noted throughout the record and in the BLM answer to the protest filed by Fischer, the key element prior to implementation of any action is the development of site-specific management plans for each allotment within the Phillips RA that considers all resource problems and management opportunities. The development of those plans will be open to all interested parties including Defenders of Wildlife. 8/

Accordingly, the protest in this case was properly denied since the formulation of the EA was done in compliance with NEPA requirements and because all interested parties will have an opportunity to participate in the development of site-specific management plans at a later time.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Lewistown, Montana, District Office is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

8/ In Natural Resources Defense Council v. Morton, supra, the district court noted that an AMP is a part of a permit between BLM and a range user; however, the court did not preclude the concept that a thorough and adequate AMP in conjunction with a programmatic statement could meet NEPA requirements. Id. at 839 n.18.

